Supreme Court, U.S.
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No. 02-1748

IN THE

Supreme Court of the United States

CHRYSLER CORPORATION,

Petitioner,

v.

DOROTHY CLARK,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

By applying state-law sufficiency standards to a motion under FED. R. CIV. P. 50, the Sixth Circuit has staked out a position directly at odds with the majority of circuits. Respondent does not dispute this fact, but rather rests her opposition on a misplaced claim that Chrysler has waived this argument, and on a confused misreading of this Court's ruling in *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996). Respondent's brief provides no good reason why this Court should leave unresolved this important and recurring question of federal procedure.

At a minimum, a GVR is warranted to permit the Sixth Circuit to review the $3 million punitive damage award in light of *State Farm Mutual Automobile Insurance Co. v. Campbell*, 123 S. Ct. 1513 (2003), which had not been decided at the time the Sixth Circuit ruled and which contradicts the court of appeals' affirmance of the punitive damage award under *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996). Respondent again focuses her efforts on advancing a spurious waiver claim, then attempts to distinguish this Court's GVR orders in two other cases involving *Gore* excessiveness challenges to multimillion-dollar punitive damage awards against automobile manufacturers for alleged design defects. *See Ford Motor Co. v. Romo*, 123 S. Ct. 2072 (2003); *Ford Motor Co. v. Smith*, 123 S. Ct. 2072 (2003). Because the Sixth Circuit's *Gore* analysis mirrors in key respects the lower courts' reasoning in *Romo* and *Smith*, a GVR is warranted here as well.

I. REVIEW IS WARRANTED TO RESOLVE THE CIRCUIT SPLIT OVER THE RULE 50 STANDARD

A. Chrysler Preserved The Issue Below

Respondent contends that Chrysler did not preserve the first question presented in its petition: whether the Sixth Circuit erred in holding, contrary to the rulings of nine other circuits, that a federal court sitting in diversity should apply

state, rather than *federal*, sufficiency-of-the-evidence standards in ruling on a motion for judgment as a matter of law under FED. R. CIV. P. 50. Respondent is incorrect: Chrysler raised this issue before the panel as well as before the en banc court—and the panel expressly passed on it. This easily suffices to preserve the issue for review by this Court.

Because the Sixth Circuit's "firm, fixed rule is that one panel of the court cannot overrule a prior precedential holding," *Sandusky Mall Co. v. NLRB*, 242 F.3d 682, 692 (6th Cir. 2001), it would have been futile for Chrysler to ask the panel to overrule the long line of Sixth Circuit caselaw holding that Rule 50 motions in diversity cases are reviewed under state standards of evidentiary sufficiency. Nonetheless, Chrysler did raise the issue in its appellate briefs, pointing out that the Sixth Circuit's rule was contrary to the rule applied by the majority of circuits and arguing that the evidence was insufficient under the federal standard. *See* Br. at 16 n.3 ("The majority of circuits hold that federal standards should be applied in judging the sufficiency of the evidence in connection with a j.m.l. motion, even in diversity cases."). Moreover, Chrysler simply noted the existence of the relevant Sixth Circuit precedent, while carefully avoiding any suggestion that the minority view was correct. *See id.* at 16 ("In diversity cases, *this Court has held* that the law of the forum state provides the standard of review regarding the legal sufficiency of the evidence.") (emphasis added).[1]

Chrysler raised the issue again as its lead argument before the en banc court, which, unlike the district court, had the power to overrule Sixth Circuit precedent. *See* Pet. for Rehearing at 7 ("This Court should grant en banc rehearing and adopt the majority rule, which is the only rule consistent with FED. R. CIV. P. 50 and Supreme Court precedent."). Although the en banc court directed Respondent to file a re-

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[1] Nor did Chrysler's motion for judgment as a matter of law concede that state-law sufficiency standards applied; rather, it simply invoked Federal Rule 50. *See* Defendant's Renewed Motion for Judgment as a Matter of Law at 1.

sponse to Chrysler's petition, it ultimately declined rehearing en banc.

Respondent's assertion that "there is no ruling from the Sixth Circuit on this issue," Opp. 12, is false. The Sixth Circuit expressly stated—twice, in fact—that it was applying state-law sufficiency standards, holding that "[i]n a diversity case, the denial of a motion for judgment as a matter of law based on sufficiency of the evidence is reviewed under the law of the state whose substantive law governs, which in this case is Kentucky." Pet. App. 24a; *see also id.* at 30a-31a.

This Court's "traditional rule . . . precludes a grant of certiorari *only* when the question presented was not pressed or passed upon below," *United States v. Williams*, 504 U.S. 36, 41 (1992) (emphasis added and quotation marks omitted). "[T]his rule operates (as it is phrased) in the disjunctive, permitting review of an issue not pressed so long as it has been passed upon," and *vice versa*. *Id.*[2] *Accord Payton v. New York*, 445 U.S. 573, 582 n.19 (1980) ("Although it is not clear from the record that appellants raised this constitutional issue in the trial courts, since the highest court of the State passed on it, there is no doubt that it is properly presented for review by this Court."). Here, Chrysler argued the issue before the panel as well as the en banc court *and* the Sixth Circuit expressly ruled on the issue. Under this Court's well-settled "pressed or passed upon" standard, Chrysler preserved the issue for review.

B. The Circuits Remain In Conflict Over The Proper Rule 50 Standard

1. Respondent's assertion that the circuit split on this question was "resolved" by *Gasperini*, Opp. 13, is contradicted by the fact that numerous circuits have held, subse-

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[2] Indeed, in *Williams*, the Court squarely rejected the notion that "a party [must] demand overruling of a squarely applicable, recent circuit precedent" in order to preserve an issue for the Court's review. 504 U.S. at 44. *See also United States v. Jimenez-Recio*, 123 S. Ct. 819 (2003) (reviewing question involving settled circuit precedent that was not raised until petition for rehearing en banc); *id.* at 824 (Stevens, J., dissenting).

quent to *Gasperini*, that federal standards apply—whereas other circuits have held, also subsequent to *Gasperini*, that state standards apply. The circuit split persists.

Post-*Gasperini*, the majority of courts of appeals have continued to hold that federal standards apply. *See Collazo-Santiago v. Toyota Motor Corp.*, 149 F.3d 23, 27 (1st Cir. 1998); *Baweja v. Roach*, 24 Fed. Appx. 198, 199 (4th Cir. 2002); *Ellis v. Weasler Eng'g Inc.*, 258 F.3d 326, 336-37, *amended on denial of reh'g on other grounds*, 274 F.3d 881 (5th Cir. 2001); *Mangren Research & Dev. Corp. v. Nat'l Chem. Co.*, 87 F.3d 937, 941 (7th Cir. 1996); *Voohries-Larson v. Cessna Aircraft Co.*, 241 F.3d 707, 718 (9th Cir. 2001); *Ensminger v. Terminix Int'l Co.*, 102 F.3d 1571, 1573 (10th Cir. 1996); *Nat'l Fire Ins. Co. of Hartford v. Fortune Constr. Co.*, 320 F.3d 1260, 1267-68 (11th Cir. 2003).[3]

Likewise post-*Gasperini*, two courts of appeals have continued to hold that state standards apply—the Sixth Circuit (as illustrated by this case and by, for example, *Morales v. Honda Motor Co.*, 151 F.3d 500, 506 (6th Cir. 1998)), and the Eighth Circuit. *See Rogers v. Allstate Ins. Co.*, 47 Fed. Appx. 797, 798 (8th Cir. 2002); *Stockmen's Livestock Market, Inc. v. Norwest Bank of Sioux City, NA*, 135 F.3d 1236, 1240 (8th Cir. 1998).

Respondent's assertion that *Gasperini* resolved the circuit split is contradicted by the caselaw and reflects an insight apparently lost on the authors of one of the leading treatises on federal procedure, who continue to believe that "[t]o date, the Supreme Court has not resolved the disagreement." 9 James Wm. Moore, *Moore's Federal Practice* §§ 50.66, 50.80, at 50-103 -05 (3d ed. 2002). Indeed, the Eighth Cir-

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[3] In *Freund v. Nycomed Amersham*, 326 F.3d 1070, 1078 (9th Cir. 2003), the court reversed the district court for "permitting California law to trump Federal Rule 50." The court reasoned that Rule 50's application "'affects only the process of enforcing litigants' rights and not the rights themselves'" and thus did not run afoul of the Rules Enabling Act by overriding a California law governing waiver of arguments. *Id.* (quoting *Burlington N. R.R. Co. v. Woods*, 480 U.S. 1, 8 (1987)).

cuit has recognized, post-*Gasperini*, the continuing "uncertainty about whether federal courts should apply state law standards or federal law standards to motions for a judgment notwithstanding the verdict in diversity cases." *Sphere Drake Ins. PLC v. Trisko*, 226 F.3d 951, 956 n.1 (8th Cir. 2000) (quotation omitted).

As the cases cited above illustrate, this important and recurring question of federal procedure obviously remains unresolved and certiorari is warranted to dispel the confusion persisting in the lower courts.

2. Respondent is also wrong on the merits. Although Respondent contends that *Gasperini* resolves the circuit split in her favor by supposedly requiring application of state-law sufficiency standards, Opp. 14, Respondent's argument rests on a misreading of this Court's ruling. *Gasperini* involved a substantive state law limiting the amount of damage awards. *See* 518 U.S. at 426-27 (noting that the state law in question "controls how much a plaintiff can be awarded"). This case, in contrast, concerns the application of a Federal Rule of Civil Procedure, which *Gasperini* makes clear displaces any contrary state law. *Id.* at 427 n.7. This is particularly so where, as here, the choice of standard implicates the Seventh Amendment's right to a jury trial, as well as the "strong federal policy against allowing state rules to disrupt the judge-jury relationship in the federal courts." *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525, 538 (1958). Because the Seventh Amendment limits review of civil jury determinations, the quantum of evidence necessary to create a jury issue is therefore one of federal law in cases tried in the federal courts.[4]

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[4] The danger to Seventh Amendment rights is particularly visible in States where the sufficiency-of-the-evidence standard makes it *easier* for a judge to take a case from the jury. In such States, a litigant's federal right to a jury trial would be endangered if a court invoked the state standard to take a case from a federal jury that would have been permitted to decide the case under federal law. For example, the Maryland rule at issue in *Wratchford v. S.J. Groves & Sons Co.*, 405 F.2d 1061 (4th Cir.

Respondent's reliance on the "outcome determinative" test of *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945), *see* Opp. 13-14, is misplaced. As an initial matter, the test is unnecessary when the law or rule "[c]oncern[s] matters covered by the Federal Rules of Civil Procedure," *Gasperini*, 518 U.S. at 427 n.7, and the question presented here—the standard of evidentiary sufficiency under Federal Rule 50—falls squarely within that category. Even assuming *arguendo* that state sufficiency standards have substantive content, *Gasperini* makes clear that "the 'outcome determination' test must not be applied mechanically," but rather with an eye toward discouraging forum-shopping and avoiding "'inequitable administration of the laws.'" 518 U.S. at 428 (quoting *Hanna v. Plumer*, 380 U.S. 460, 468 (1965)). Here, it is difficult to envision litigants shopping among fora to choose a state with a favorable evidentiary-sufficiency standard.

Respondent's contention that the Sixth Circuit erred by applying a *de novo* standard of review (Opp. 16-17) is not only mistaken, it has nothing to do with the questions presented by this petition. Respondent's confusion stems from the inability to distinguish between standards of evidentiary sufficiency and standards of appellate review. This is a mistake Respondent makes throughout her opposition. *See, e.g.*, Opp. 16 n.16 (mischaracterizing standards of evidentiary sufficiency as "standards of review").

Respondent further errs in contending that the evidence in this case was sufficient to defeat judgment as a matter of law even under the more rigorous federal standard. Opp. 18. As Judge Nelson recognized, the plaintiff's evidence supporting punitive damages was exceedingly weak. Pet. App. 36a-39a. Chrysler suffered a $3 million punishment for designing a latch that indisputably *doubled* federal strength stan-

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[Footnote continued from previous page]

1969) (*see* Pet. 14), provided that a verdict must be directed if the plaintiff's injury could have resulted with equal probability from two causes, only one of which was the defendant's conduct. In such a circumstance, federal courts would allow juries to choose between the inferences.

dards, on the grounds that it did not perform a test proposed by plaintiff's experts—even though those experts themselves did not perform the proposed test, and even though the experts could not identify any other automobile manufacturer in the world who performed such a test. 1 Tr. 136-37; 2 Tr. 196-200. Under federal standards of evidentiary sufficiency, plaintiff's weak punitive damages claim would never have reached the jury.[5]

In the final analysis, even if Respondent's argument on the merits is correct and the majority of circuits have it wrong, the lower courts are still deeply and undeniably split on this important issue. Certiorari is therefore warranted.

II. AT A MINIMUM, THIS COURT SHOULD GVR IN LIGHT OF *STATE FARM*

1. Chrysler Did Not Waive Its *Gore* Challenge

A cursory glance at the Sixth Circuit's opinion demolishes Respondent's claim, Opp. 19-23, that Chrysler failed to preserve this issue. The Sixth Circuit expressly considered and rejected Chrysler's *Gore* challenge. *See* Pet. App. 34a ("Chrysler also maintains that judgment as a matter of law should have been entered in its favor as to the claim for punitive damages because the jury's award was so excessive as to violate the Due Process Clause. This court does not agree."); *id.* at 35a-36a (analyzing amount of punitive damages under *Gore* and concluding that "[i]n summary, we cannot say that the punitive damages award exceeds the constitutional limit."). In fact, Respondent concedes this point, acknowledging that "the Sixth Circuit . . . ma[d]e a *Gore* analysis." Opp. 22.

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[5] Respondent's claim that Chrysler "never contested the jury's findings that its truck was defective and unreasonably dangerous, or that its conduct was negligent," Opp. 1, is false. Chrysler expressly noted, among other things, that Respondent's failure to conduct testing or to provide reliable data about alternative designs amounted to a failure, as a matter of law, to prove design defect—the cornerstone of all of Respondent's liability theories. *See, e.g.*, Br. at 25 n.7.

The fact that the Sixth Circuit squarely addressed and resolved the issue suffices to preserve it for this Court's review. *See United States v. Williams*, 504 U.S. 36, 41 (1992) (issues that have been "passed upon" by the lower court are preserved for this Court's review). Although Respondent insists that Chrysler did not raise this issue in the courts below, even if this were true—which it plainly is not, *see* Pet. App. 34a—it would not matter because the issue was "passed upon" by the Sixth Circuit. *See Orr v. Orr*, 440 U.S. 268, 274-75 (1979) (recognizing "the elementary rule that it is irrelevant to inquire . . . when a Federal question was raised in a court below when it appears that such question was actually considered and decided") (quotation omitted).

2. *State Farm* Compels A Different Result

Respondent's brief largely avoids any substantive discussion of this Court's recent ruling in *State Farm*, and for good reason: *State Farm*, which was decided *after* the Sixth Circuit ruled, makes clear that the $3 million punitive damage award is excessive and unconstitutional. At a minimum, a GVR is warranted to permit the court of appeals to apply *State Farm*.[6]

State Farm clarified and strengthened the *Gore* guideposts. Respondent does not dispute that *State Farm* directly undercuts the Sixth Circuit's reasoning in many respects. For example, Respondent does not take issue with Chrysler's argument, Pet. 19-21, that *State Farm* demonstrates that the Sixth Circuit misapplied the reprehensibility guidepost by adopting a *per se* rule of reprehensibility in personal injury cases, and by disregarding Chrysler's undisputed compliance with federal safety standards. Nor does Respondent contest Chrysler's argument, Pet. 23-24, that the Sixth Circuit failed entirely to apply *Gore*'s comparable penalties guidepost, even though *State Farm* expressly looked to "[t]he most relevant civil sanction" in determining excessiveness. 123 S. Ct.

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[6] As of July 15, 2003, this Court has already GVR'd eight other punitive damage cases in light of *State Farm*.

at 1526. Respondent's silence on these points only confirms the obvious: the ruling below is plainly inconsistent with *State Farm*.

Although Respondent suggests, Opp. 28, that the 13:1 ratio of punitive to compensatory damages is constitutionally permissible, that argument is flatly contradicted by *State Farm*, which holds that where, as here, the "compensatory damages are substantial, then a lesser ratio, *perhaps only equal to compensatory damages*, can reach the outer limit of the due process guarantee." 123 S. Ct. at 1524 (emphasis added). Indeed, this Court has already GVR'd in light of *State Farm* five punitive damage cases with *lower* ratios than the 13:1 ratio at issue here. *See DeKalb Genetics Corp. v. Bayer CropScience, S.A.*, 123 S. Ct. 1828 (2003) (3:1 ratio); *Ford Motor Co. v. Smith*, 123 S. Ct. 2072 (2003) (5:1 ratio); *Key Pharms., Inc. v. Edwards*, 123 S. Ct. 1781 (2003) (10:1 ratio); *Anchor Hocking, Inc. v. Waddill*, 123 S. Ct. 1781 (2003) (10:1 ratio); *Nat'l Union Fire Ins. Co. v. Textron Fin. Corp.*, 123 S. Ct. 1783 (2003) (10:1 ratio).

Respondent strives mightily to avoid a GVR by attempting to distinguish this case from *Romo* and *Smith*. Opp. 29. For example, Respondent contends that *Romo* and *Smith* involved *older* vehicles than the vehicle in this case; Respondent also emphasizes the difference in postjudgment interest rates in the relevant jurisdictions. *Id.* That these purported "distinctions" are the best Respondent can muster is an implicit acknowledgment that this case is identical to *Romo* and *Smith* in many material respects. Similarly, Respondent's observation that this case was tried in federal court, whereas *Romo* and *Smith* were tried in state courts, is completely beside the point: *State Farm* establishes rules of constitutional law that are applicable in *all* courts. *See, e.g., DeKalb Genetics*, 123 S. Ct. 1828 (GVR to Federal Circuit).

The *State Farm* Court emphasized the dangers of "[v]ague instructions" to the jury, and "the imprecise manner in which punitive damages systems are administered" in many States. 123 S. Ct. at 1520. Those dangers materialized

here, as the district court, following Kentucky's "bare bones" approach to jury instruction, failed to provide the jury with any guidance as to how to calculate the amount of punitive damages. 3 Tr. 180. Although Respondent contends that Chrysler agreed to portions of the instruction, Opp. 22, Respondent does *not* dispute that the district court rejected Chrysler's request that the jury be instructed that the fact Chrysler's design exceeded federal safety standards created a presumption that the design was not defective. 3 Tr. 136. The absence of such an instruction enabled the jury to impose an arbitrary and excessive $3 million punishment. *See* Pet. App. 38a-39a (punitive damages should not have been awarded because "Chrysler's door latch was in full compliance with Federal Motor Vehicle Safety Standard 206, promulgated by the United States Government in an effort to assure door latch safety") (Nelson, J., dissenting); Opp. 5 (Chrysler's design "admittedly complied with the federal door latch standard").

Finally, Respondent's heavy reliance on factual mischaracterizations (*e.g.*, describing this violent high-speed collision as "a moderate accident," Opp. 24) and extreme rhetoric (*e.g.*, "Mr. Clark paid the ultimate price," *id.*) only calls attention to the weakness of her legal arguments. *State Farm* leaves no doubt that the Sixth Circuit's application of each of the *Gore* guideposts is legally flawed and that the punitive damages award in this case is excessive and unconstitutional. Because *State Farm* is directly relevant to numerous aspects of the Sixth Circuit's holding on punitive damages, and because the Sixth Circuit did not have the benefit of this Court's decision at the time it issued its ruling, a GVR is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, this Court should GVR in light of *State Farm*.

Respectfully submitted.

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